

**From:** Schweiss, Jon  
**Sent:** Friday, March 29, 2013 3:47 PM  
**To:** Kelly Wright  
**Cc:** susanh@ida.net; Bill Bacon; Jill E. Grant; Sheldrake, Beth; Rochlin, Kevin; Woods, Jim  
**Attachments:** ORA FMC Letter to EPA R10 October 25 2012.pdf; ORA FMC Letter to EPA R10 January 3 2013.pdf; ORA FMC Response Letter March 25 2013.pdf

**Categories:** Provided for LEPIC 1 to 11-19 2013

Hi, Kelly – I wanted you to know that I recently responded to two letters we received from FMC (the first in October 2012, the second in January 2013) relating to the Independent Review. I've attached copies of all three letters to this email.

Best,  
Jon

**Jon Schweiss | Senior Advisor**  
Office of the Regional Administrator  
U.S. Environmental Protection Agency | Region 10  
O: 206.221.4893 | C: 206.553.1690



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

**MAR 25 2013**

OFFICE OF THE  
REGIONAL  
ADMINISTRATOR

Mr. Robert T. Forbes, Director  
EHS Remediation/Governance  
FMC Corporation  
1735 Market Street  
Philadelphia, PA 19103

Dear Mr. Forbes:

Thank you for the two letters you sent regarding our plans to conduct an Independent Review of excavation and treatment technologies related to elemental phosphorous contamination at the FMC Operable Unit of the Eastern Michaud Flats Superfund site. Those letters reflect a number of observations, questions and recommendations that we have taken under careful consideration. We noted your expressed desire for a point-by-point written response. We have elected instead to focus our response on selected major points, and propose that we discuss any remaining concerns you may have in subsequent conversations.

**Independent Review Entity**

Our goal is to retain an organization capable of assembling excellent scientific and technological expertise to conduct the Independent Review. We have ready access (via a standing interagency agreement with the Department of Energy) to such an organization: Argonne National Laboratory (ANL). We believe ANL is an excellent choice for rendering the truly objective and thorough review we seek. As with any project conducted under contract or Interagency Agreement, EPA will discuss potential or perceived conflicts of interest with DOE and ANL and, if necessary, ensure that appropriate mitigation measures are implemented. The proposed work is being performed and funded under CERCLA. This work will be conducted in a manner that is not inconsistent with the NCP. While we have a signed general agreement with DOE to perform the Independent Review, discussions with ANL on specifically defining the work to be undertaken in Phase 1 of the review have not yet commenced. The level of funding we eventually devote to Phase 1 of the review is anticipated to be commensurate with the resource needs identified in these discussions.

**Draft Scope of Work**

The draft scope of work for Phase 1 referenced in your letter has not been revised since its development and transmission to the Tribes last summer. The draft scope was intended to nominally frame subsequent, more detailed discussions - hence, it was and is still a preliminary document. Further work on refining and finalizing the scope of work for Phase 1 will commence once the Tribes have secured technical expertise to assist them in this effort. Your many observations, questions and recommendations related to the draft scope of work are duly noted. EPA understands its responsibilities under CERCLA and the NCP. Toward that end, the review entity will neither perform any comparative analyses of potential excavation/treatment technologies (ETT), nor undertake any formal evaluation of ETT relative to the nine criteria prescribed in the NCP, nor render any recommendations on the relative merits of any candidate ETTs in its report.

**Documentation**

We are committed to transparency in our dealings on this and other matters related to our management of the Superfund program. Toward that end, we will share with FMC - for informational purposes - the final scope of work with which we commission the Independent Review. We will also provide FMC and others the final report arising from Phase 1 of the Independent Review. FMC and others are welcome to comment on that final report. The report and any comments that are submitted will be entered in the Administrative Record for the final remedy for the site.

Thank you for both your interest in this important endeavor and your thoughtful input. Please do not hesitate to contact me (at 206.553.1690 or 206.221.4896) should you wish to discuss this matter further.

Sincerely,



Jon Schweiss  
Senior Advisor

cc: Mathy Stanislaus, Assistant Administrator  
Office of Solid Waste and Emergency Response  
U.S. Environmental Protection Agency

Jim Woolford, Program Director  
Office of Solid Waste and Emergency Response  
U.S. Environmental Protection Agency

Dennis J. McLerran, Regional Administrator  
Region 10  
U.S. Environmental Protection Agency

bcc: Beth Sheldrake, Program Manager, Region 10  
Lori Cohen, Associate Director, Region 10

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# FMC Corporation

January 3, 2013

Mr. Jon Schweiss  
U.S. EPA Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

Re: Eastern Michaud Flats Superfund Site – Pocatello, Idaho  
Independent Review – FMC Operable Unit  
Remediation technologies for soil contaminated with elemental phosphorus

Dear Mr. Schweiss:

Thank you for your phone calls acknowledging receipt of the October 25, 2012 letter from FMC Corporation (FMC) that provided comments and questions regarding EPA's preliminary outline for organizing and administering an independent review panel to further examine potential treatment technologies for elemental phosphorus in soil at the FMC Operable Unit (OU) of the Eastern Michaud Flats Superfund Site. That EPA outline, entitled "EPA's Draft Proposal to Commission an Independent Review of Excavation/Treatment Technologies for the FMC Operable Unit (OU) of the Eastern Michaud Flat Superfund Site," was attached to a July 10, 2012 letter that the U.S. Environmental Protection Agency (EPA) sent to the Shoshone-Bannock Tribes (the Tribes). You stated in your phone calls that you had yet to review our letter with EPA management, but that after doing so you would contact us with responses to the points we have raised. As I indicated in our phone discussions, FMC would appreciate a written response from EPA. Our view is that a written response is necessary to assure that the considerable number of specific comments and questions we presented are fully addressed. This will facilitate development of an appropriate framework for empanelling the independent review panel and establishing the procedures under which it will operate.

As a follow up to FMC's October 25, 2012 letter, please find attached a copy of an article that appeared in the December 20, 2012 edition of the *Sho-Ban News* entitled "SBT renews working relationship with DOE." Please ensure that EPA's response to FMC's October 25, 2012 letter, specifically its response to item #6 (repeated below), takes into account and addresses the fact that the U.S. Department of Energy (DOE) has a twenty-year formal working relationship with the Tribes. EPA's preliminary proposal states that the Argonne National Laboratory, a DOE facility, would have a central role in establishing and administering the independent review panel. The longstanding DOE-Tribal working relationship combined with the Tribes' strong interest in the review panel's work raises significant concerns to whether DOE has the requisite independence to carry out that role. It is FMC's view that the DOE does not have the requisite independence to carry out that role. This is particularly highlighted by the fact that the



Idaho National Laboratory, which borders the Fort Hall Reservation, now incorporates the Argonne-West Laboratory.

6. Phase 1: Technology Review – Major Process Features – Selection of the Review Entity section. This section states that EPA will engage a “qualified expert entity.”

- a. The word “independent” is notably absent here, as well as any description of the specific area of expertise. EPA should add the qualification that the entity must be independent from EPA, the Tribes and FMC and their contractors.
- b. FMC understands that EPA has, at least preliminarily, identified Argonne National Laboratories as being considered for this role. Which Argonne National Laboratory location is being considered? Please state why the Argonne National Laboratories would be considered “independent.” What is their expertise in evaluating remedial technologies, in particular with respect to elemental phosphorus-contaminated soils and similar soil conditions? What process did EPA follow in selecting them?

Thank you for your consideration. We look forward to your responses.

Very truly yours,



Robert T. Forbes  
Director, EHS Remediation/Governance

cc: Dennis McLerran  
Kevin Rochlin

...huddled around  
Davis, and me and the  
other hunter huddled  
next to Jones to transfer  
body heat until the am-  
bulance could arrive,"  
Haskett continued.

It would take the  
ambulance another 30

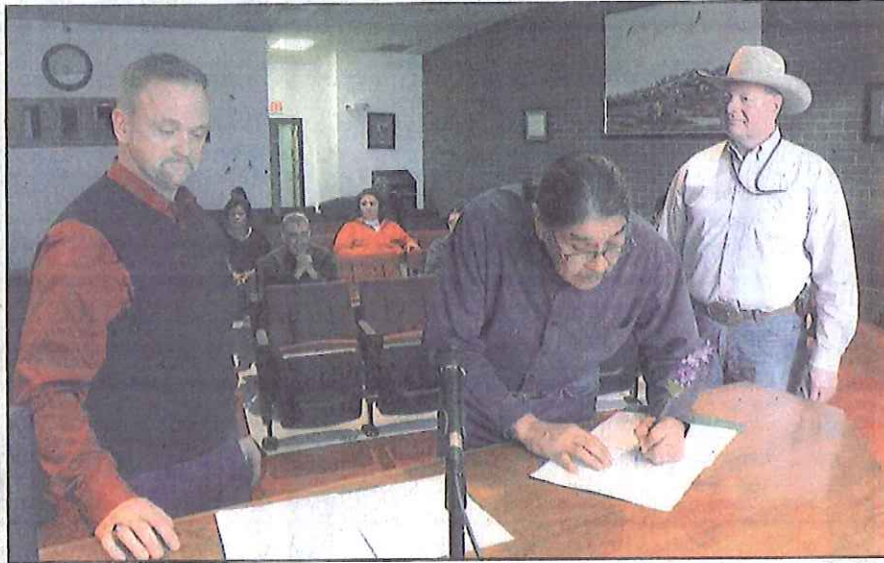
...was taken to Lower  
County Hospital.

Jones and Davis  
were able to make  
a full recovery, and

Officer Haskett  
visited Jones while  
he was at Portneuf.  
"Of course he didn't

...Haskett is a  
hero; and because of  
his quick thinking, and  
experience, the families  
of Jones and Davis will  
be able to spend many  
more years with their  
family member and  
friends.

## SBT renews working relationship with DOE



FHBC Chairman Nathan Small signs the AIP as Rick Provencher (left), manager of the DOE Idaho Department Operations Office and Bob Pence, American Indian Program Manager for the Department of Energy look on. (Roselynn Wahtomy photo)

By ROSELYNN WAHTOMY  
Sho-Ban News

FORT HALL — Delegates from the Department of Energy met with the Fort Hall Business Council on Tuesday, December 18 to renew an Agreement in Principle (AIP) with the Shoshone-Bannock Tribes.

Bob Pence, American Indian Program Manager for the Department of Energy said, "We appreciate the opportunity to stand with you today and sign an new agreement in principle renewing our commitment together to work on things of mutual interest that involve the Tribes and the Department of Energy at the Idaho National Laboratory."

FHBC Chairman Nathan Small and Rick Provencher, manager of the DOE Idaho Department Operations Office, signed copies of the formal agreement.

DOE has had a formal relationship with the Shoshone-Bannock Tribes since 1992, which included a working agreement at that time

and a funding agreement, explained Pence.

"We've evolved from then to now with a series of successive agreements and the latest of which, is the Agreement in Principle, which is a five year agreement signed today."

The agreement in principle captures the areas of common interest between the Tribes and DOE.

Pence continued, "We recognize, as a department, the importance of working with effected Indian Tribes. We also recognize their connection to the Idaho National Laboratory where we do our work — the ancestral ties to the land. Through the AIP we recognize the importance and sovereignty of the 1868 Fort Bridger Treaty and continue to honor that as a supreme law of the land."

Pence expressed they were excited to renew their commitment in working with the Shoshone-Bannock Tribes as they are a very important part of their work process.

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October 25, 2012

## **Via Email & Federal Express**

Mr. Jon Schweiss  
U.S. EPA Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

Re: Eastern Michaud Flats Superfund Site – Pocatello, Idaho  
Independent Review – FMC Plant OU  
Remediation technologies for soil contaminated with elemental phosphorus

Dear Mr. Schweiss:

FMC Corporation (FMC) has reviewed the July 10, 2012 letter that the U.S. Environmental Protection Agency (EPA) sent to the Shoshone-Bannock Tribes (the Tribes) transmitting “EPA’s Draft Proposal to Commission an Independent Review of Excavation/Treatment Technologies for the FMC Operable Unit (OU) of the Eastern Michaud Flat Superfund Site” (the EPA Draft Proposal). That letter requested the Tribes to provide any comments to you, as a senior advisor to Regional Administrator Dennis McLerran and the EPA manager assigned to the planned review process. FMC accordingly is directing the following comments to your attention. FMC believes that EPA consideration of these comments will assist EPA in managing issues associated with the independent review process and providing transparency, public notice and opportunities for public input that in FMC’s view are not only warranted but required.

While FMC intends these requests for clarification to be constructive in nature, as an initial matter we must state our general objection to the independent review that EPA is planning to initiate and we reserve all rights regarding this review, which has no foundation in the CERCLA statute or the National Contingency Plan (NCP). In addition, as a matter of record there have been a number of comprehensive reviews conducted both with respect to the FMC OU and other locations regarding potential remediation technologies for potentially applicable to soil contaminated with elemental phosphorus. All these reviews have reached the same conclusion – on-site containment is the preferred remedial technology. Commissioning another review is an unnecessary use of Federal time and Federal money beyond the fact that it is inconsistent with the NCP.

### General Questions/Requests for Clarification

1. The materials that have been and will be generated in the review process described in the EPA letter and attached EPA Draft Proposal likely are subject to disclosure under the Freedom of Information Act (FOIA), because they don’t



appear to be within any of the limited FOIA disclosure exemptions. FMC requests that EPA send it copies of all future correspondence and reports associated with the project. Please let us know whether EPA will accommodate this FMC request. If not, we will need to continue to use the FOIA request option to obtain these documents. Note that FMC was not copied on EPA's July 10, 2012 letter and that we obtained this letter only through a FOIA request. We would like assurance that EPA will provide FMC with copies of review project documents as a matter of course and without the need for submitting FOIA requests.

2. The EPA letter and the EPA Draft Proposal are ambiguous with respect how EPA plans to fund both the Independent Review Entity and any associated technical assistance that EPA may provide to the Tribes. Have Federal funds been secured for one or both of these elements? What is the source and level of Federal funding for each? Are the funds that currently have been secured sufficient to cover all the work needed in the review process, or will additional Federal funding be required in the future? What happens if the Federal funding is exhausted before the review is completed?
3. Has the review process commenced? Has a contract or other formal agreement been developed and signed with the Independent Review Entity? Is the schedule included in the EPA Draft Proposal still accurate, including the schedule calling for the Review Entity to issue its final report 10 months after Federal funding is "activated?"

#### Specific Questions/Requests for Clarification on the EPA Draft Proposal

4. Context section - 2<sup>nd</sup> paragraph. The effort is described as "unique." Can you confirm that EPA has never previously commissioned or funded any similar review of an EPA-selected CERCLA remedial action, whether interim or final? If this is not the first instance, please provide information regarding those other independent reviews, including information regarding the site and issues involved and the work product and outcomes of that review, or let us know that FMC will need to submit a FOIA request for those materials.
5. Context section – 3<sup>rd</sup> paragraph. The effort is described as intending to "provide information to further inform an evaluation of one or more ETT [Excavation/Treatment Technologies] according to the nine criteria provided in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP)."
  - a. Can you describe what role the Review Entity will have, if any, in evaluating the ETT under the nine remedy evaluation criteria set forth in the NCP? Will EPA request the independent review panel to conduct that evaluation, or will EPA retain sole responsibility for that? FMC has these

questions based on the described Phase 1 scope for the “Independent Review Entity,” which includes evaluation of efficacy, feasibility, health and safety and cost. All of these factors are NCP remedy evaluation criteria. Charging the review panel with evaluating these factors rather than reservation that evaluation to EPA creates, at a minimum, the appearance of an improper delegation of EPA’s responsibility and authority under the NCP.

- b. The evaluation of remedial alternatives under the nine NCP criteria is a comparative process, in which potential technologies are compared under the nine criteria against other alternatives. Please clarify whether and how the review panel would compare potential ETT under the NCP criteria against other alternatives, including containment as specified in the Interim Amended Record of Decision.
  - c. Given that exhaustive reviews of a number of candidate technologies have already been conducted, FMC believes that the review panel should not be charged with reviewing potential ETT that have already been evaluated. Does EPA share this view? If not, what steps would EPA take to avoid having the panel develop evaluations that would be redundant with previous ones, so as not to misuse Federal funds in conducting redundant work?
6. Phase 1: Technology Review – Scope - Types of ETT section – The Draft Proposal states that “the Review Entity will not actively consider theoretical, conceptual and/or basic research ETT.” FMC believes that this should be further clarified to ensure that the Review Entity clearly understands and adheres to this limitation on its scope of work. For example, one Tribal member has publically advocated ETT involving argon blanketing under a dome in the furnace building area. Given that this approach has never been applied to remediation of elemental phosphorus-containing soils or to FMC’s knowledge to remediation of any similar soil conditions, it can only be classified as “theoretical, conceptual and/or basic research ETT.” FMC suggests that EPA provide this proposal to the Review Entity as an example of an ETT that should not be actively considered.
7. Phase 1: Technology Review – Scope - Feasibility of ETT section. This section, or another section of the document, should clarify that the review panel must also consider the proposed disposition of treatment residuals and the potential need for further remediation in an area subjected to an ETT must also be considered.
8. Phase 1: Technology Review – Major Process Features – Framing the Work of the Review Entity section. This section of the document states that “framing work will be accomplished in weekly conference calls until completion.” Have

these weekly calls begun? Are agendas and minutes for these conference calls being prepared? Other than employees of the contractor selected to perform this “independent review”, who else will participate in these calls and are they truly “independent”?

9. Phase 1: Technology Review – Major Process Features – Selection of the Review Entity section. This section states that EPA will engage a “qualified expert entity.”
  - a. The word “independent” is notably absent here, as well as any description of the specific area of expertise. EPA should add the qualification that the entity must be independent from EPA, the Tribes and FMC and their contractors.
  - b. FMC understands that EPA has, at least preliminarily, identified Argonne National Laboratories as being considered for this role. Which Argonne National Laboratory location is being considered? Please state why the Argonne National Laboratories would be considered “independent.” What is their expertise in evaluating remedial technologies, in particular with respect to elemental phosphorus-contaminated soils and similar soil conditions? What process did EPA follow in selecting them?
10. Phase 1: Technology Review – Major Process Features – Selection of the Review Entity section. The section states that “the Review Entity will self-identify the members of the review team, but input on known experts in the field may be provided by the Tribes and EPA.” This section also should state that team members must be “independent” of EPA, the Tribes, FMC and their contractors, and clarify the areas of expertise that are relevant to the project. The document states that experts can be nominated by the Tribes and EPA. FMC requests that it also be allowed to nominate experts, not only because this review will focus on the FMC OU but also because of FMC’s long-term experience in managing elemental phosphorus and its knowledge regarding recognized experts in this subject area.
11. Phase 1: Technology Review – Major Process Features – Selection of the Review Entity section. Have the “critical competencies” been identified? Is one of them experience with managing large quantities of elemental phosphorus? The document should state that someone who has worked with a commercial producer of elemental phosphorus other than FMC could be, and in the absence of any associations with EPA, the Tribes, FMC or their contractors would be, considered independent. FMC confirms that anyone who has ever worked for FMC Corporation or at the FMC Pocatello site would not be considered “independent.”

12. Phase 1: Technology Review – Major Process Features – Interactions with Review Entity section. EPA states that it “agrees to allow this process to proceed independently and to avoid engaging in separate conversations with the Review Entity for purposes of influencing outcome of this work.” Will EPA place this same restriction on the Tribes and their members and contractors (including whatever technical assistance contractor EPA funds to assist the Tribes in connection with this review)? How will EPA monitor its own compliance and that of the Tribes to assure that there are no improper separate communications with the Review Entity?
13. EPA Draft Proposal – Phase 1: Technology Review – Major Process Features – Product Review section. To the extent that the EPA transmittal letter indicates that “EPA will consider the product of the independent review when selecting the final remedy for the FMC Operable Unit,” the review should be a transparent process and public comments should be solicited on the draft report.
14. EPA Draft Proposal – Phase 2: Further Evaluation of Promising ETT – Decision to Proceed section. This section states that “Phase 2 may be launched if Phase 1 either identifies new promising ETT not previously profiled in the RI/FS or related efforts, or divulges new information related to previously profiled ETT that supports the need for further evaluation.” This threshold for launching Phase 2 should be better clarified – for example, “promising ETT” could be misconstrued to include “theoretical, conceptual and/or basic research ETT” that the Review Entity was specifically directed not to actively consider. Because the selected Review Entity may be a large research institution, it could have an institutional incentive to recommend further research or other work requiring additional Federal funding. The scope of “promising ETT” must be limited to technologies that are sufficiently viable, effective and safe that they likely would meet the NCP nine remedial action criteria and not be eliminated in the required NCP comparative analysis, so as to exclude those that are “theoretical” and require further research and development.

Thank you for your consideration. We look forward to your responses.

Very truly yours,



Robert T. Forbes  
Director, EHS Remediation/Governance

Mr. Jon Schweiss – US EPA  
October 25, 2012 – Page 6

Cc: Dennis McLerran  
Kevin Rochlin